STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
MAY SAFFAR,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5566-10
RJI NO. 01-11-103048

ALBANY MEDICAL CENTER HOSPITAL, LATHAM INTERNAL MEDICINE AND PEDIATRICS, ELIZABETH HIGGNS, M.D. and DR. TRICIA PELNIK-FECKO, M.D.,

Defendants.

Supreme Court of Albany County All Purpose Term, January 6, 2012

APPEARANCES:

Peter J. Scagnelli, Esq.
Attorney for Plaintiff
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Albany, New York 12207

Maynard, O'Connor, Smith & Catalinotto, LLP
(Robert A. Rausch, Esq. AAG)
Attorney for Defendants
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Albany, New York 12203

TERESI, J.:

Defendants move for summary judgment pursuant to CPLR 3212 and seek an order dismissing the medical malpractice cause of action, dismissing the complaint against the defendants Dr. Higgins and Dr. Pelnik-Fecko and dismissing the allegation of lack of informed

consent. The plaintiff opposes the motion and maintains questions of fact exist that precludes summary judgment.

Plaintiff commenced this action to recover for injuries she sustained from a laser hair removal procedure in which she suffered second degree burns to multiple areas of her body. The plaintiff was a long-time patient of the defendant Latham Internal Medicine and Pediatrics ("Latham") which is owned and operated by defendant Albany Medical Center ("AMC"). Defendants, Doctors Higgins and Pelnik-Fecko ("Doctors") are employees of Albany Medical Center and provide services at the Latham facility. Plaintiff maintains her claims are based in negligence and not medical malpractice as laser hair removal is not a medical procedure.

Plaintiff had been experiencing ingrown hairs on her body and consulted with Dr. Higgins in September 2005 in regard to laser hair removal treatment. Dr. Higgins explained the procedure to the plaintiff and reviewed the informed consent with the plaintiff before she signed it. The plaintiff had seven treatments for hair removal from September 23, 2005 to February 21, 2008. Although the Doctors were trained and certified for the operation of the laser removal machine, most treatments were performed by Christine Ayers/Gamache, a licensed aesthetician and an employee of defendants. The plaintiff alleges all of her treatments were supervised by the Doctors.

The plaintiff contends during the February 21, 2008 treatment, she complained to the technician that the laser hair removal treatment was "too hot" on her skin. The plaintiff claims the technician told her she was doing fine and that "your skin can take it". Plaintiff contends the heat settings for her treatment on February 21, 2008 were somehow changed which caused her injuries. The plaintiff alleges no spot tests was performed by the defendants to ascertain if she

could tolerate the procedure. Afterward, the plaintiff noticed her skin was red and painful. The next day, the plaintiff consulted with a dermatologist, Dr. Singer who determined after an examination of the plaintiff, that she had sustained second degree burns. The plaintiff thereafter moved to South Carolina and was treated by Dr. Treen, a board certified dermatologist. Dr. Treen determined the plaintiff suffered second degree burns on her body as a result of the negligent administration and supervision of the laser hair removal treatments by the defendants. Dr. Treen has treated the plaintiff for several years and maintains that she continues to experience hyperpigmentation/discoloration of her skin.

The plaintiff alleges Dr. Higgins reviewed the informed consent form with her before she signed it. The plaintiff contends the form informed her that she may experience "reddening, irritated raised rash, blistering, mild burning, swelling, bruising, numbing or temporary discoloration of the skin." The plaintiff claims the informed consent form does not mention the possibility of experiencing second degree burns. Plaintiff alleges she was under the impression the laser procedure would be performed by or supervised by a medical doctor. The plaintiff alleges she would not have proceeded with the procedure if she knew she could possibly experience second degree burns to her skin.

The defendants allege New York State has no laws or regulations governing laser hair removal. The defendants claim Christine Gamache completed a four week training program in laser hair removal at the Institute Der-Med in Atlanta, Georgia and has been employed by Latham since 2006. The defendants claim the plaintiff only complained to Ms. Gamache at the time of her visit and never mentioned the burns to anyone at Latham Internal Medicine. The defendants allege the plaintiff returned for an additional treatment on August 11, 2008 and no

burns were observed. The defendants contend the laser hair removal procedure is cosmetic and does not constitute the practice of medicine. The defendants allege the Doctors cannot be held liable for any actions or inactions of Ms. Gamache. The defendants allege the Doctors did not cause or contribute to the injuries of the plaintiff and any claims against them must be dismissed. The defendants maintain the plaintiff was fully informed of the risks of the treatment and signed the informed consent after reviewing it with Dr. Higgins.

On a motion for summary judgment, the movant must establish be admissible proof the right to judgment as a matter of law. (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. (Barr v. County of Albany, 49 NY2d 557 [1980], and all evidence must be viewed in the light most favorable to the opponent to the motion. (Davis v. Klein, 88 NY2d 1008 [1996]).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . .mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (Zuckerman v City of New York, 49 NY2d at 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. (O'Hara v Tonner, 288 AD2d 513 [3rd Dept. 2001]). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on a motion for summary judgment as is reliance upon surmise, conjecture or speculation. (Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 [2004]).

In medical malpractice actions, a plaintiff must prove that the defendants deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. (Stukas v. Streiter, 83 AD3d 18 [2nd Dept. 2011]). A defendant seeking summary judgment in a medical malpractice action "must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby". (Brady v. Westchester County Healthcare Corp., 78 AD3d 1097 [2nd Dept. 2010]). A plaintiff must rebut the defendants's prima facie showing to demonstrate the existence of a triable issue of fact. (Alvarez v. Gerberg, 83 AD3d 974 [2nd Dept. 2011]).

The plaintiff maintains she never alleged a cause of action for medical malpractice. The plaintiff contends her allegations are based in negligence for the burns she sustained as a result of the laser hair removal procedure. Since, the plaintiff has not alleged a claim for medical malpractice, defendants' motion for summary judgment on this issue must be denied.

The complaint alleges causes of action for negligence, failure to supervise and the failure to obtain plaintiff's informed consent. An employer is liable for the negligence of an employee when the latter "is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be exercising some control, directly or indirectly, over the employee's activities" (Lundberg v State of New York, 25 NY2d 467 [1969]). When a plaintiff invokes the doctrine of respondeat superior, the plaintiff has the burden of establishing by a fair preponderance of the credible evidence that the act complained of occurred while the defendant's employee was acting within the scope of his employment (Davis v City of New York, 226 AD2d 271, lv denied 88 NY2d 815 [1996]). An employer may be held vicariously liable for the intentional or negligent acts of its employees if the employees are acting within the scope of their

employment. (Judith M. v. Sisters of Charity Hosp., 93 NY2d 932 [1999]). In instances where an employer cannot be held vicariously liable for its employees' torts, "the employer can still be held liable under theories of [negligent retention and supervision if] the employer knew or should have known of the employee's propensity for the conduct which caused the injury." (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [2nd Dept. 1997], lv denied 91 NY2d 848 [1997]).).

The issue of whether an act was within the scope of employment is a question of fact for the jury. (McMindes v. Jones, 41 AD3d 1196 [4th Dept. 2007]; Frazier by Weston v. State, 64 NY2d 802 [1985]). In determining the scope of the employment, "the test has come to be whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions." (Riviello v. Waldron, 47 NY2d 297 [1979]).

Defendants' motion for summary judgment on behalf of the Doctors is denied as questions of fact exist that preclude the granting of the motion. Although the plaintiff did not specifically plead a claim based upon respondeat superior, the plaintiff has demonstrated an actionable claim and summary judgment must be denied. (Ramos v. Jake Realty Co., 21 AD3d 744 [1st Dept. 2005]; Alvord & Swift v. Muller Constr. Co., 46 NY2d 276 [1978]).

The defendants seek summary judgment on the issue of informed consent and allege the plaintiff acknowledged her awareness of the risks involved in laser hair removal. The plaintiff claims she would not have enured the laser procedure is she was advised that she could sustain second degrees burns to her body.

As to the issue of informed consent, the plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the patient's circumstances would have refused to

undergo the procedure if reasonably informed of the significant perils. (Proce v. Franklin General Hospital, 83 AD2d 903 [2nd Dept. 1981], appeal denied 55 NY2d 603 [1981]). The test is an objective one - what a reasonably prudent person in the plaintiff's circumstances would have decided if reasonably informed. (Zeleznik v. Jewish Chronic Disease Hosp., 47 AD2d 199 [1975]).

A review of the pertinent part of the informed consent recites "I understand there is a possibility of rare side effects such as ...mild burning..." Two dermatologists have confirmed the plaintiff sustained second degree burns as a result of the laser treatment. The plaintiff has raised a question of fact as to whether she would have endured the laser procedure if she had known that she may sustain second degree burns to her body. The defendants have not demonstrated their entitlement to summary judgment as the plaintiff has raised a question of fact relating to informed consent which must be resolved by a jury. (Osorio v. Brauner, 242 AD2d 511 [1st Dept. 1997), lv denied 91 NY2d 813 [1998]).

Accordingly, the defendants' motion for summary judgment pursuant to CPLR 3212 is denied.

This Decision and Order is returned to the attorney for the plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
March 2, 2012

Joseph C. Teresi, J.S.C.

Papers Considered:

1. Notice of Motion dated November 11, 2011;
2. Affidavit of Robert A. Rausch, Esq. dated November 11, 2011 with Exhibits A-L;
3. Defendants' Memorandum of Law dated November 1, 2011;
4. Affirmation of Peter J. Scagnelli, Esq. dated December 30, 2011 with Exhibits A-U;
5. Affidavit of May Saffar dated December 28, 2011;
6. Plaintiff's Memorandum of Law dated December 30, 2011;
7. Affidavit of Ben M. Treen, M.D. dated January 3, 2012;
8. Affidavit of Robert A. Rausch, Esq. dated January 3, 2012.